AYOROMI HELEN

v.

PP

COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
HASAN LAH J
[CRIMINAL APPEAL NO: K-05-71-1999]
21 OCTOBER 2004

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in 1713.9 g heroin - Appeal against conviction and sentence - Failure to cross-examine defence on material parts - Whether trial judge erred in rejecting defence - Whether conviction and sentence set aside*

CRIMINAL PROCEDURE: *Defence - Failure to cross-examine defence on material parts - Whether conviction and sentence set aside - Dangerous Drugs Act 1952, s. 39B - Evidence Act 1950, s. 32(1)(i)*

The accused together with another person, one Greene Richard Charles ('Greene') who had since passed away, was convicted and sentenced under s. 39B of the Dangerous Drugs Act 1952 for trafficking in dangerous drugs of 1713.9g heroin. Hence, this appeal by the accused. The issue was whether the learned judge erred in rejecting the defence by the accused thereby failing to cross-examine the accused on material parts of the defence.

Held (allowing the appeal and quashing the conviction and sentence)
Per Augustine Paul JCA delivering the judgment of the court:

[1] The learned judge did not accept the explanation of the accused as it was not supported by other evidence. However, he failed to consider the fact that the material part of the defence of the accused was not subjected to any cross-examination. Failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony. (p 9 a-e)

[2] The fact that the defence was not a recent fabrication was supported by the contents of exh. D19 that was similar to the defence advanced. Greene who was arrested together with the accused and who had since passed away would have made a statement as well. It would have either supported the defence of the accused or would have contradicted it. If it was the

latter the prosecution ought to have tendered it in evidence under s. 32(1)(i) of the Evidence Act 1950 to rebut the defence of the accused. In the absence of such a course adopted by the prosecution it could be safely inferred that it was favourable to the defence of the accused. Further, it must be noted that the accused said in cross-examination that Greene did not say anything when she told the customs officer that Greene gave her the impugned powder. That added greater weight to the evidence of the accused. The accused ought to have been cross-examined on the defence advanced by her and the failure to do so amounted to an acceptance of the material parts of her defence. Accordingly, she established that she had no knowledge that what was found in her custody were in fact dangerous drugs. Therefore there was no evidence to show that she was in possession of them, an element that must be proved before the presumption in s. 37(da) of the Dangerous Drugs Act 1952 could arise. The learned judge had therefore erred in rejecting the defence of the accused without taking relevant matters into consideration. (pp 9 g-h & 10 a-c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Tertuduh, bersama-sama dengan seorang Greene Richard Charles ('Greene'), yang kemudiannya telah meninggal dunia, telah disabitkan dan dihukum di bawah s. 39B Akta Dadah Berbahaya 1952 kerana mengedar 1713.9g heroin. Tertuduh merayu dan isu yang berbangkit adalah sama ada yang arif hakim tersilap kerana menolak pembelaan tertuduh dan tidak memeriksa balas tertuduh berkaitan aspek-aspek material pembelaannya.

Diputuskan (membenarkan rayuan dan membatalkan sabitan dan hukuman)
Oleh Augustine Paul HMR menyampaikan penghakiman mahkamah:

[1] Yang arif hakim tidak menerima penjelasan tertuduh kerana ia tidak disokong oleh keterangan-keterangan lain. Bagaimanapun beliau gagal mempertimbang fakta bahawa aspek-aspek penting pembelaan tertuduh telah tidak dihadapkan kepada sebarang pemeriksaan balas. Kegagalan memeriksa balas seseorang saksi berhubung aspek penting kesnya samalah seperti menerima testimoni-testimoninya.

[2] Fakta bahawa pembelaan bukanlah suatu rekaan baru disokong oleh eks. D19 yang serupa dengan pembelaan yang dikemukakan. Greene yang ditangkap bersama tertuduh dan yang kemudian meninggal dunia tentulah telah juga merakamkan kenyataan. Kenyataannya itu akan sama ada menyokong ataupun menyanggahi pembelaan. Sekiranya ia menyanggahi

pembelaan, maka pendakwaan harus mengemukakannya sebagai keterangan di bawah s. 32(1)(i) Akta Keterangan 1950 bagi menyangkal pembelaan tertuduh. Dengan pendakwaan gagal mengambil langkah tersebut, andaian boleh dibuat bahawa ianya adalah menyokong pembelaan tertuduh. Selain itu, harus diingat bahawa tertuduh menyatakan dalam pemeriksaan balas bahawa Greene tidak berkata apa-apa apabila beliau, yakni tertuduh, memberitahu pegawai kastam bahawa tepung yang disyaki dadah berbahaya diberikan kepadanya oleh Greene. Ini menambahkan lagi kekuatan keterangan tertuduh. Tertuduh dengan itu seharusnya diperiksa balas tentang pembelaannya itu dan kegagalan berbuat demikian samalah seperti menerima aspek-aspek material pembelaan beliau. Oleh itu, tertuduh telah membuktikan bahawa beliau tiada pengetahuan bahawa apa yang ada dalam jagaannya adalah sebenarnya dadah berbahaya. Akibatnya, tiada bukti yang menunjukkan bahawa dadah tersebut berada dalam milik tertuduh, yang mana ini merupakan elemen yang mesti dibuktikan sebelum andaian s. 37(da) Akta Dadah Berbahaya 1952 boleh berbangkit. Yang arif hakim dengan itu telah tersilap apabila menolak pembelaan tertuduh tanpa mengambilkira perkara-perkara yang relevan.]

Case(s) referred to:
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(da)
Evidence Act 1950, s. 32(1)(i)

For the appellant - T Suresh; M/s Kuldip Singh & Co
For the respondent - Nurulhuda Nur'aini Mohd Noor DPP

[Appeal from High Court, Alor Setar; Criminal Trial No: 45-1-1998]

Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul JCA:
The charge preferred against the accused in the High Court at Alor Setar reads as follows:

Bahawa kamu pada 7hb Mei 1997 pada kira-kira pukul 4.10 petang di Pejabat Unit Pengesan Dadah, Bukit Kayu Hitam, di Daerah Kubang Pasu, di dalam Negeri Kedah Darul Aman dengan seorang lain iaitu Greene Richard Charles (Si mati) dengan lanjutan bersama kamu semua telah mengedar dadah berbahaya iaitu 1713.9 gram heroin, satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dibaca dengan Seksyen 34 Kanun Keseksaan.

She claimed trial to the charge. The case for the prosecution as summarised by the learned High Court Judge in his grounds of judgment reads as follows:

> Pada 7hb Mei 1997, PW4 (Suhaimi Abd Razak) pegawai kastam dari Unit Pengesan Dadah, bersama-sama dengan dua orang anggota lain (PW5 dan PW6) dan dua ekor anjing pengesan sedang menjalankan tugas di pejabat Kastam, Bukit Kayu Hitam.
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> Pada jam lebih kurang 3.30 petang semasa berada di bahagian kenderaan masuk PW4 ternampak sebuah teksi PV 4628 yang dipandu oleh PW3 berserta kedua-dua tertuduh masuk lorong pemeriksaan kastam. Selesai pemeriksaan dijalankan PW4 mengarahkan pemandu teksi tersebut (PW3) membawa kedua-dua tertuduh ke Unit Pengesan Dadah tidak jauh dari situ untuk pemeriksaan lanjut.
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> Di pejabat Kastam Unit Pengesan Dadah PW4, PW5 dan PW6 mengenalkan diri mereka masing-masing kepada kedua-dua tertuduh dan seterusnya menjalankan pemeriksaan lanjut.
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> Menurut PW4 ketika itu Tertuduh Pertama (Ayoromi Helen) membawa beg pakaian berwarna hitam, beg tangan hitam dan beg plastik kuning (P7, P9 dan P10) sementara Tertuduh Kedua (Richard Charles, si mati) membawa beg hitam (P8).
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> PW4 seterusnya mengarahkan PW5 dan PW6 memeriksa beg-beg pakaian kedua-dua tertuduh. Hasil dari pemeriksaan tersebut mereka hanya menjumpai pakaian-pakaian dan barang-barang sendiri sahaja.
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> Seterusnya PW4 mengarahkan PW6 memeriksa kasut yang dipakai oleh Tertuduh Pertama (Ayoromi Helen). Kasut tersebut (P2 B&E) berjenama 'Emozioni' berwarna putih, saiz sembilan. Dengan menggunakan 'probe needle' yang dicucuk di bahagian tapak kedua kasut, PW6 mendapati ada kesan serbuk putih di 'needle' tersebut. PW4 kemudian terus melapurkan kepada PW9 berkenaan penemuan serbuk putih tersebut.
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> Selepas dari itu PW4 dan PW9 kembali di pejabat UPD untuk melihat serbuk putih tersebut. Di situ PW9 membaca 'caution' kepada kedua-dua tertuduh dan mereka serta barang-barang masing-masing diiringi ke pejabat pencegah di mana secara resmi PW4 menyerahkan kedua-dua tertuduh serta barang-barang mereka kepada PW9.
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> Menurut PW5, beliau diarah memeriksa Tertuduh Kedua dan beg hitam kepunyaannya (P8). Hasil dari pemeriksaan tersebut PW5 tidak menemui apa-apa benda yang menyalahi undang-undang. Walau bagaimanapun PW5 sempat melihat pemeriksaan yang dilakukan oleh PW6 ke atas kasut Tertuduh dan beliau pasti bahawa terdapat kesan-kesan serbuk putih di 'probe needle'.

Selain dari menjalankan pemeriksaan kasut Tertuduh Pertama dengan menggunakan 'probe needle' PW6 juga diarah oleh PW9 memotong kedua-dua belah kasut Tertuduh Pertama. Hasilnya beliau mendapati dua bungkusan dibungkus dengan 'brown tape' dari setiap kasut tersebut (P2H1&2 & P2G1&2).

PW6 juga semasa menjalankan pemeriksaan ke atas beg Tetuduh Pertama (P7) telah menjumpai tiga 'enamel pots' (P2 B, D, F). Dari setiap 'enamel pot' ini PW6 mendapati 2 bungkusan plastik berisi serbuk putih disyaki heroin (P3C1&2, P3E1&2, P3G1&2).

PW7 (Azimah bt Abd Hamid) ialah saksi pendakwa yang menjalankan pemeriksaan ke atas badan Tertuduh Pertama. Beliau dibantu oleh PW8 (Norhayati Hamzah). Pemeriksaan tersebut dijalankan di pejabat Pencegah Bukit Kayu Hitam. Menurut PW7 sebelum pemeriksaan dijalankan Tertuduh Pertama kelihatan resah. Dalam keadaan demikian Tertuduh Pertama berkata kepada PW6, 'I give you money. You don't check me.' Percakapan ini didengar dan disaksikan oleh PW8.

Adapun tujuan menjalankan ujian-ujian tersebut di atas ialah bagi mempastikan barang-barang tersebut mengandungi heroin dan menentukan kandungan heroin sebenar dalam barang-barang kes tersebut.

Di akhir analisisnya PW1 mendapati keseluruhan jumlah berat sebenar dadah heroin dalam barang-barang kes tersebut ialah 1,713.9 gram.

Di akhir kes pendakwa saya berpuashati bahawa pendakwa telah berjaya membuktikan satu kes *prima facie* terhadap Tertuduh Pertama. Jelas dari keterangan saksi-saksi pendakwa bahawa barang-barang kes yang mengandungi dadah telah dijumpai dari tubuh Tertuduh Pertama sendiri dan juga sebahagiannya dari kasut slipper yang dipakainya dan sejumlah lagi dari 'enamel pots' yang berada dalam milikan dan kawalannya.

Perlu juga diambil kira kelakuan Tertuduh Pertama semasa pemeriksan badan dijalankan. Beliau nampak resah dan gelisah menurut keterangan PW7 dan PW8. PW7 dan PW8 juga menyatakan ketika itu Tertuduh Pertama cuba menyogok mereka dengan wang. Dari kelakuan beliau jelas bahawa Tertuduh Pertama mempunyai 'knowledge' terhadap dadah tersebut.

Saya berpuas hati bahawa anggapan-anggapan dibawah s. 37(d)(a)(i) dan 37(e)(a)(i) berjaya ditimbulkan pendakwa terhadap Tertuduh Pertama. Tertuduh Pertama dipanggil membela diri.

We consider it necessary to reproduce the evidence of the accused in full. In her examination-in-chief she said:

a I'm from Nigeria. I was a petty trader. I'm married with 7 children between 21 years – 3 years old. I came to Asia to buy my goods. I first went to Thailand in 1997 in January. The second time was in April 1997. I went there to get the goods for my business of petty trading. I took goods back to Nigeria. I was in Bangkok from April to May 1997. I was staying alone in a hotel.

b I was arrested with one Greene Richard Charles at Bukit Kayu Hitam. I met Greene in Bangkok at Cargo Office. From Bangkok I was going to Penang to extend my visa.

Green and I were going to Penang. I became friendly with Greene. He came to my hotel. I went to his hotel. He is also from Nigeria.

c One day I went to look for my goods. All my documents were in my bag. Someone snatched my handbag. I lost all my documents i.e. passport, tickets, money etc. I then met my friend Sidikat. She gave my another passport i.e. P13.

d No visa in the passport. Then Greene and I went to the Embassy in Bangkok. They refused to give the visa. Greene advised me to come to Malaysia to get new visa. He would help me come to Malaysia. I did not know Malaysia before this. My friend told me that Greene is a good boy. I followed him.

We left Bangkok on 6 May 1997. I asked Greene to buy tickets to come to
e Malaysia. Sidikat gave me the money.

Refer P6B (identified)

This is the photograph of Greene. The flight was fully booked. We then took a bus from Bangkok to Malaysia. We started 6 pm on 6 May 1997 and arrived at Hadyai 9 am on 7 May 1997. We waited for another bus. We left Hadyai
f around 1 pm. Before leaving Hadyai Greene called me, he said he wanted to give me something to keep for him. I asked what it was. He took a paperbag from his own bag and gave me. I asked what's inside the paperbag. He said there was shaving powder. I told him to keep it himself. He said if the powder is found on a man the customs will check.

g I made some enquiries from him if it was shaving powder. He said yes. I asked him to swear on the bible that it is not dangerous thing. I asked him to open the paperbag. I saw powder (white) in the paperbag. In Nigeria, we used white powder for shaving. I believed him. I then try to put it inside my bag. He said not to put in the bag but to tuck it in my waist and my pants. He said there are many thieves in this country. I asked him why he asked me to tuck
h the powder in my pants. He told me not to worry. He said it's not dangerous. This happen in Hadyai. I put the packet in my pants. There were 4 packets.

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My friend gave me the pots. I bought the rice and curry in Bangkok. I had 2 pots. He had one pot. He also gave me white slippers. I already had my slippers (black). I then wore the white slippers. I took along my black slippers. He gave me white slippers after first checking inside the taxi. I wore white slippers and held black slippers in my hand. After the Thai Immigration, we took a taxi to the Malaysia border to go to Penang. Green arranged for the taxi.

After first checking, he asked me to give money to taxi driver. He gave me my purse. I did not give money. Then he gave white slippers. The taxi was parked. I saw 2 men in uniform. They asked us to come out of the taxi. I carried P9 and P10. He carried P7 and P8. He went into one office. They searched both of us. Our body and our bags. They were male officers. They searched Greene's body. They checked my sandals.

They also searched our bags. They asked us to go. When we were about to leave we were called back. Then when we sat down. The Chinese Customs officer took the white slippers I was wearing. He took a needle and poke into the slippers. When he took out the needle he said there was heroin. Then I told him that Greene gave it to me. I told the Chinese Officer. I then asked Greene to explain to the officer. We were both crying.

The officer asked if we knew each other. Both of us were then handcuffed. After about 1 hour we were taken to another office. I wore my black sandals to the other office. The officer took my white slippers. At this second office, the Customs Officers searched our bags. A woman Customs Officer took me to a room. She searched my body. My bags were outside. They found 4 packets tucked in my waist.

I did not say anything. I just cried. I said this boy gave it to me. They took pictures of the 4 packets. They also took pictures of my body with the packets. I did not offer any money to this woman officer. I have no money with me then. Money was in the handbag. Bag was near the chair. We were there from afternoon till 8 pm. Then we were taken to the Police Station. The Police Station is not far from there. We stayed in the Police Station for 12 days.

The pots were not opened in front of me. I gave a statement to Customs Officer on 3rd day after the arrest on 7 May 1997.

Refer to statement. This is my signature (produce) ID19.

Greene has since died. I carried with me USD1,500. When I was arrested, the money was in my handbag.

In her cross-examination she said:

I did not know Greene before meeting him at the Cargo Office. My handbag was snatched on 13/4/97.

Sidiket is my friend from Nigeria. I knew her very well. Sidiket says it is her passport. Three of us went to Embassy. The visa was refused. Sidiket told me that Greene was a good boy. Sidiket gave me money. I gave to Greene. I checked the shaving powder in Hadyai. It was an open space. I tucked the packages to my waist at the same place. I myself put the packages at my waist.

I came to Malaysia with Greene to take new visa. I plan to stay one week. My friend Reemy (she) gave me the pots at Bangkok. Reemy gave the pots to Greene to give it to me. The pots were given to me on 6/5/97.

Greene gave me the white slippers on 7 May 1997. The slippers did not fit me. But I wore them. I had no money with me. We took taxi Hadyai to Bukit Kayu Hitam. I knew Greene about one month before this. I always met Greene in Bangkok. When I was arrested my passport was with Greene.

When I told Customs Officer that Greene gave me the powder, Greene did not say anything. I carried the handbag (P9). Money was not with me.

In her re-examination she said:

The white slippers were tight for me.

The cautioned statement made by the accused was adduced in evidence through Mohd Yusof bin Hj Jaafar. It was marked as exh. D19.

The learned High Court Judge rejected the defence of the accused. As he said, *inter alia*, in his grounds of judgment:

Seperti yang dinyatakan oleh Tertuduh Pertama sendiri bahawa beliau telah melihat serbuk putih tersebut apabila ditunjukkan oleh Greene. Beliau percaya serbuk putih tersebut ialah 'shaving powder'. Sekiranya benar, kenapakah Tertuduh Pertama perlu menyorok 'shaving powder' tersebut di pinggangnya dan dalam seluarnya. Beliau tahu 'shaving powder' tersebut bukan benda berbahaya dan tambahan lagi tidak terdapat ciri-ciri paksaan di pihak Greene terhadap Tertuduh. Malah saya berpendapat Tertuduh Pertama bukanlah seorang yang boleh dikatakan buta huruf atau 'naïve'. Sebaliknya beliau seorang yang cerdik. Fakta ini dapat disaksikan semasa beliau memberi keterangan.

And further on:

Jelas dari pembelaan Tertuduh Pertama bahawa beliau cuba menyalahkan Greene. Tetapi nyata bahawa percubaannya tidak disokong oleh apa-apa keterangan. Malah keterangan beliau didapati tidak 'credible' dan tidak 'consistent'. Seperti yang disebut di awal tadi, sekiranya beliau percaya bahawa itu adalah 'shaving powder' kenapa perlu disembunyikan. Mengapa tidak disimpan di dalam beg sahaja atau Greene sendiri yang membawanya. Tidak terdapat sebarang keterangan bahawa Tertuduh dalam keadaan didesak, diugut atau dipaksa oleh Greene.

It becomes patent that the learned High Court Judge did not accept the explanation of the accused as it was not supported by other evidence. In coming to his conclusion he had failed to consider the fact that the material part of the defence of the accused was not subjected to any cross-examination. As Raja Azlan Shah CJ (Malaya) (as His Highness then was) said in *Wong Swee Chin v. P*P [1981] 1 MLJ 212 at p. 213:

> A correct statement of the law is that failure of the defence to cross examine the prosecution witnesses on the matter merely goes to the credibility of their testimony … … On this point we need only say there is a general rule that failure to cross examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules, there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* where Haslan J said at p. 122:
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> > In *Phipson on Evidence* (11th Ed) paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross examine will amount to an acceptance of the witness's testimony, viz, where " … … … the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy … … … or when counsel indicates that he is merely abstaining for convenience, eg, to save time." And where several witnesses are called on the same point, it is not always necessary to cross examine them all'.

This rule would apply with equal force to witnesses called by the defence as well. This is particularly so as there is a duty on the prosecution to negate defences that have been raised and the burden of proof is on the prosecution to prove its case beyond reasonable doubt till the end of the case. This would therefore require cross-examination of evidence given by the defence witnesses by the prosecution in order to discharge the burden it carries. Clearly the defence advanced by the accused cannot be said to be of a romancing character. Nor were other witnesses called by the defence to testify on the same issue so as to dispense with the cross-examination of the accused. The fact that the defence is not a recent fabrication is supported by the contents of exh. D19 which is similar to the defence advanced. It was made three days after the arrest of the accused. Greene who was arrested together with the accused and who has since passed away would have made a statement as well. It would have either supported the defence of the accused or would have contradicted it. If it is the latter the prosecution ought to have tendered it in evidence under s. 32(1)(i) of the Evidence Act 1950 to rebut the defence of the accused. In the absence of such a course having been adopted by the prosecution it can safely be inferred that it is favourable to the defence of

the accused. It must also be noted that the accused said in cross-examination that when she told the Customs Officer that Greene gave her the powder, Greene did not say anything. This can only mean that he did not dispute it thereby adding greater weight to the evidence of the accused. In the circumstances the accused ought to have been cross-examined on the defence advanced by her and the failure of the prosecution to do so amounts to an acceptance of the material parts of her defence. This means that she has established that she had no knowledge that what was found in her custody were in fact dangerous drugs with the result that there is no evidence to show that she was in possession of them, an element which must be proved before the presumption contained in s. 37(da) of the Dangerous Drugs Act 1952 can be considered. The learned High Court Judge had therefore erred in rejecting the defence of the accused without taking relevant matters into consideration.

In the upshot we allowed her appeal and quashed the conviction and sentence.